No. 84-1044

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

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PACIFIC GAS AND ELECTRIC COMPANY,
*Appellant,*

v.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
*Appellee.*

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**On Appeal from the Supreme Court of California**

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## BRIEF *AMICUS CURIAE* ON BEHALF OF THE BELL ATLANTIC TELEPHONE COMPANIES

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The Bell Atlantic telephone companies[1] submit this brief as *amicus curiae* in support of appellant Pacific Gas and Electric Company's ("PGandE") appeal from a final

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[1] The Bell Atlantic telephone companies, each of which is a wholly owned subsidiary of Bell Atlantic Corporation, are The Diamond State Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, and The Chesapeake and Potomac Telephone Company.

judgment of the Supreme Court of California denying PGandE's petition for a writ of review of a decision of the Public Utilities Commission of the State of California ("CPUC"). In its decision, the CPUC compelled PGandE to include in its monthly billing envelope, on eight occasions over a two-year period, inserts prepared by Toward Utility Rate Normalization ("TURN"), a private organization that purports to represent the interests of PGandE's residential ratepayers. PGandE appeals on the ground that the decision of the CPUC violates PGandE's rights of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

## INTEREST OF *AMICUS CURIAE*

The Bell Atlantic telephone companies are privately owned corporations providing telecommunications services to residential and business customers in Delaware, Maryland, New Jersey, Pennsylvania, Virginia, West Virginia, and the District of Columbia. In four of these states, legislatures are considering or have recently considered bills that would establish state-sponsored organizations similar to TURN and mandate that the message inserts of those organizations be placed in utility billing envelopes.[2] The District of Columbia City Council is considering similar legislation.[3] This Court's decision in the present case will determine the power of these jurisdictions to enact such legislation consistent with the First Amendment rights of the Bell Atlantic telephone companies.

In addition, the services provided by the Bell Atlantic telephone companies are subject to regulation by state and local public utilities commissions. This Court's

[2] A. 1460, A. 1468, S. 1244, 1984 Sess., New Jersey; H. 514, 1985 Sess., Pennsylvania; S. 392, 1984 Sess., Virginia; S. 226, 1985 Sess., West Virginia.

[3] No. 6-28, 1985 Sess., District of Columbia.



decision will determine the power of these public utilities commissions to provide organizations similar to TURN with compelled access to the billing envelopes of the Bell Atlantic telephone companies.

Each of the parties to this case has granted its written consent to the filing of this brief *amicus curiae*. The parties' written consents have been filed with the Clerk of this Court.

## SUMMARY OF ARGUMENT

The decision of the CPUC mandating that PGandE include in its billing envelopes materials prepared by TURN infringes upon the First Amendment rights of PGandE in at least two respects. *First*, the CPUC's decision compels PGandE to become an instrumentality for disseminating the messages of TURN, a party selected by the CPUC on the basis of the content of TURN's messages. This compulsion violates PGandE's First Amendment right to refrain from participating in the speech of another. *Second*, the CPUC's decision restricts PGandE's ability to communicate freely with its ratepayers through its own monthly newsletter. Inclusion of the TURN insert will dilute the impact of the views presented by PGandE in its newsletter, and may also increase the cost to PGandE of communicating through the newsletter.

The CPUC's infringement of PGandE's First Amendment rights cannot be justified by the fact that PGandE is a public utility or by the argument that certain space in PGandE's billing envelope is the "property" of PGandE's ratepayers. Regulated utilities possess First Amendment rights, and the entire PGandE billing envelope is solely the property of PGandE. Moreover, even if certain space within the billing envelope were held not to be the property of PGandE, the CPUC's commandeering of the entire envelope to assure the dissemination of TURN's messages would be inconsistent with the guar-

antees of the First Amendment. Fundamental constitutional rights in any event should not turn on such abstruse inquiries as determining the property rights in the space in an envelope.

The CPUC's action cannot be justified as a narrowly tailored means of achieving a compelling state interest. The state interest advanced by the CPUC is not sufficiently compelling. Further, that interest could be achieved by means less restrictive of PGandE's First Amendment rights than the means chosen by the CPUC.

## ARGUMENT

### I. The Guarantees of the First Amendment Apply to Public Utilities Such as PGandE.

The First and Fourteenth Amendments to the United States Constitution guarantee that no State shall "abridg[e] the freedom of speech." In two recent cases, this Court established that governmental regulatory power over public utilities does not deprive such entities of First Amendment rights to freedom of speech. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566-68 (1980); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 534 n.1 (1980).

### II. The CPUC's Decision Granting TURN Access to PGandE's Billing Envelopes Infringes upon PGandE's First Amendment Rights.

#### A. The CPUC's Decision Compels PGandE to Participate in Disseminating the Messages of Another Party Selected by the CPUC.

The "right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *see Board of Education* v. *Barnette*, 319 U.S.



624, 633-34 (1943). *Wooley* established that, in the absence of a compelling state interest, the State of New Hampshire could not compel a New Hampshire automobile owner to display the state motto "Live Free or Die" on the license plate of his automobile. This Court based its decision in *Wooley* on the "First Amendment right to avoid becoming the courier for [the message of the State]." *Wooley*, 430 U.S. at 717.

The First Amendment freedom from compelled speech recognized in *Wooley* is fully applicable to this case. Like the automobile owner in *Wooley*, PGandE has been compelled by the CPUC to participate in disseminating the messages of another. Moreover, like the "Live Free or Die" motto at issue in *Wooley*, the messages that PGandE must include in its billing envelopes are not messages with which PGandE necessarily agrees.

In three respects, the facts in *Wooley* are arguably distinguishable from those of this case. None of these distinctions, however, renders *Wooley* inapplicable to the present case, because none of the distinctions negates the fundamental flaw in the CPUC's action—the compulsion of PGandE by a state agency to participate in the speech of another under circumstances in which PGandE may wish to refrain from speaking.

*First*, the CPUC's decision cannot be defended on the ground that the CPUC has refrained from prescribing the specific messages to be communicated in PGandE's billing envelopes. By selecting TURN as the party empowered to require PGandE to place inserts in the billing envelopes, the CPUC has prescribed the source of the messages to be disseminated. To support its choice of TURN, the CPUC stated that "[i]t is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E."[4] Thus, as the CPUC recognizes, its

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[4] *Toward Utility Rate Normalization* v. *Pacific Gas & Electric Co.*, Decision No. 83-12-047 (Cal. PUC Dec. 20, 1983) [hereinafter

decision is necessarily based upon a judgment concerning the content of the messages to be communicated by TURN. This Court has established that such content-based discrimination among purveyors of ideas is inconsistent with the guarantees of the First Amendment. *See Police Department* v. *Mosley*, 408 U.S. 92 (1972).[5]

*Second*, it is of no First Amendment significance that the "Live Free or Die" motto in *Wooley* was physically imposed on the property of New Hampshire residents whereas the TURN message is inserted in PGandE's billing envelope. The fundamental concern in *Wooley* was not the manner in which the New Hampshire residents' property was used, nor even the fact that private property was in some sense appropriated. Rather, *Wooley* stands for the proposition that no one may be compelled to participate in disseminating the messages of another. That proposition is fully applicable to the CPUC's compulsion of PGandE.

*Finally*, the fact that the TURN inserts must identify their source and state that their content has not been endorsed by PGandE does not serve to distinguish

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"Dec. No. 83-12-047"], *reprinted in* Appendix to the Jurisdictional Statement of Appellant Pacific Gas and Electric Company [hereinafter "J.S. App."] at A-1, A-17, *Pacific Gas & Electric Co.* v. *Public Utilities Commission of the State of California*, No. 84-1044 (U.S. Dec. 28, 1984), *modified*, Decision No. 84-05-039 (Cal. PUC May 2, 1984), *reprinted in* J.S. App. at A-45.

[5] The CPUC's content-based discrimination distinguishes the present case from *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), in which access to private property for the purpose of expressing views was provided in a content-neutral manner. Moreover, interest groups other than TURN are likely to conclude that ratepayers would benefit from exposure to their views as well. If a number of these groups seek access to the billing envelopes of PGandE and other utilities, the CPUC's decision, combined with the limited size of utility billing envelopes, may well produce further content-based discrimination among purveyors of ideas.



*Wooley*. Such a disclaimer of PGandE sponsorship in no way diminishes the fact that PGandE has been compelled by state action to disseminate the messages of TURN. The disclaimer merely removes the false inference that recipients of the billing envelope might otherwise draw that PGandE is the source of TURN's messages or necessarily agrees with them. It was not confusion over the source of the message that rendered the state law requirement invalid in *Wooley*—it was the fact that the state forced the individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715.[6]

### B. The CPUC's Decision Limits PGandE's Ability to Communicate with Its Ratepayers.

The CPUC's decision granting TURN compelled access to PGandE's monthly billing envelopes also infringes upon PGandE's First Amendment right to communicate with its ratepayers. For more than sixty years, PGandE has included in its billing envelope *PGandE Progress* (*"Progress"*), a monthly newsletter in which PGandE explains rate changes, disseminates information concerning energy conservation, and provides responses to consumer inquiries.[7] Inclusion of the TURN insert in PGandE's billing envelope will dilute the impact of the messages that PGandE conveys through *Progress*. This effect will be particularly significant if, as is likely, TURN advocates positions inconsistent with the views of PGandE.

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[6] The Court in *Wooley* relied on, among other authorities, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which held unconstitutional a Florida statute placing an affirmative duty on newspapers to publish the replies of political candidates whom they had criticized. It cannot be seriously suggested that this statute would have passed constitutional muster if it had gone on to provide that the replies in question must contain a disclaimer of endorsement by the newspaper compelled to carry the reply.

[7] The cost of printing *Progress* is borne entirely by PGandE's stockholders.

Further, the TURN insert, the weight of which is within the sole control of TURN, will fill some or all of the space that PGandE has historically used to communicate through *Progress*. If PGandE wishes to distribute *Progress* in a month in which the TURN insert is mandated, PGandE must pay any additional postage necessitated by the inclusion of *Progress*.[8] Such restrictions on PGandE's ability to communicate freely with its ratepayers on issues of concern to the utility and its customers patently infringe upon PGandE's First Amendment rights. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566-68 (1980); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 533-35 (1980).

## III. The CPUC's Infringement of PGandE's First Amendment Rights Cannot Be Justified by the Argument That the "Extra Space" in PGandE's Billing Envelopes "Belongs" to PGandE's Ratepayers Rather Than to PGandE.

The CPUC attempts to justify its infringement of PGandE's First Amendment rights by the argument that the "extra space" in PGandE's billing envelopes—*i.e.*, "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost"[9]—is the "property" of PGandE's ratepayers rather than that of the utility. This conclusion rests on a flawed and illusory analysis, and is inconsistent with established doctrine of this Court. Moreover, even if the "extra space" in PGandE's billing envelopes were properly considered to be the "property" of the utility's ratepayers, the CPUC's decision would nevertheless constitute a violation of PGandE's First Amendment rights.

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[8] Dec. No. 83-12-047, *reprinted in* J.S. App. at A-1, A-32 to A-33.

[9] Dec. No. 83-12-047, *reprinted in* J.S. App. at A-1, A-3.



### A. The Entire PGandE Billing Envelope Is the Property of PGandE.

The CPUC does not, and cannot, dispute that the PGandE billing envelope is the property of PGandE. Faced with this obstacle, the CPUC resorts to a fiction that it terms "extra space," a creation deriving solely from the coincidental fact that postal service may be purchased only in one-ounce increments. The CPUC regards this "extra space" as separable from the billing envelope and the postage affixed to the envelope, both of which are paid for with PGandE's funds. Having first created this fiction, the CPUC then gratuitously awards a property interest in the "extra space" to PGandE's ratepayers. This reasoning is both illogical and flatly inconsistent with the decisions of this Court.

There is no "extra space" in the PGandE billing envelope that is not the property of PGandE, and the fact that PGandE is a regulated entity does not alter this conclusion. It has long been clear that governmental regulation of privately owned utility companies does not transform those companies into public instrumentalities. And in *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23 (1926), this Court established the fundamental principle that utility ratepayers do not acquire any ownership interest in the private property of the utility that is used to provide them with services:

> "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company."

*Id.* at 32.

This Court reaffirmed the foregoing principle in the First Amendment context in *Consolidated Edison Co.* v.

*Public Service Commission*, 447 U.S. 530 (1980). *Consolidated Edison* established that bill inserts prepared by a public utility constitute use of the utility's "own billing envelopes to promulgate its views on controversial issues of public policy." *Id.* at 540. Rejecting the argument that "the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control," this Court stated that "the [New York Public Service] Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Id.* In light of the *New York Telephone* and *Consolidated Edison* cases, the CPUC's infringement of PGandE's First Amendment rights cannot be justified by the argument that certain space within the PGandE billing envelope is not the property of PGandE.

Moreover, the mere fact that PGandE could accommodate the TURN insert in its billing envelope at no additional marginal cost does not create any property interest of the sort that the CPUC has assigned to PGandE's ratepayers. A simple analogy renders apparent the fallacy in the CPUC's reasoning. Utilities own and operate automobiles or other service vehicles. At certain times when PGandE vehicles are in use, they likely are occupied by only one PGandE employee. The CPUC's decision suggests that the "extra space" within a one-occupant vehicle that could be filled at no additional marginal cost would thus became the "property" of PGandE's ratepayers. Indeed, taken to its logical conclusion, the CPUC's reasoning would suggest that any component of PGandE's property—including office buildings and other real estate—that could be used by a third party at no additional marginal cost would become, by virtue of that fact alone, the "property" of the utility's ratepayers. Such a result, in addition to being wholly inconsistent with *New York Telephone* and *Consolidated Edison*, would wreak havoc upon the operational



flexibility necessary for a utility to provide high-quality service to its customers.

### B. Even If the "Extra Space" in PGandE's Billing Envelopes Were Properly Considered to Be the "Property" of PGandE's Ratepayers, the Decision of the CPUC Would Violate PGandE's First Amendment Rights.

Even if some portion of PGandE's billing envelope were appropriately denominated the "property" of PGandE's ratepayers, the CPUC's decision compelling PGandE to afford access to its billing envelope would still infringe upon PGandE's First Amendment rights. The "extra space" concocted by the CPUC does not exist in some disembodied universe. Rather, it exists only within PGandE's billing envelope, which the CPUC has acknowledged to be the property of PGandE. Accordingly, regardless of the ownership interest assigned to any supposed "extra space" within the envelope, the CPUC has commandeered the use of PGandE's property—the billing envelope itself—in the compelled dissemination of the messages of a third party.

Further, any attempt to draw fine, metaphysical distinctions that would make fundamental constitutional rights turn on the ownership interests in the space within an envelope is beside the point and futile. As noted above, the overarching concern in *Wooley* v. *Maynard* was not that private property had been appropriated to disseminate the messages of the State. Rather, the concern was with the compulsion of New Hampshire residents to become unwilling participants in delivering the messages of another in the course of their unavoidable, everyday activities. Thus, the state statute at issue in *Wooley* "force[d] an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. In this case, PGandE has been

required—as part of its routine, unavoidable billing activity—to become the instrument for disseminating messages with which it may not agree. Irrespective of any consideration of property rights, such compulsion violates the freedom to refrain from speaking that the First Amendment guarantees.[10]

### IV. The CPUC's Decision Cannot Be Upheld as a Precisely Drawn Means of Serving a Compelling State Interest.

Any governmental regulation of speech that is based on content may be upheld only if it is found to be "a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.*, 447 U.S. at 540. In this case, the CPUC's infringement of PGandE's First Amendment rights fails to satisfy either aspect of the test set forth in *Consolidated Edison.* The state interest cited by the CPUC is insufficiently compelling in light of the First Amendment decisions of this Court. Moreover, even if the state interest cited by the CPUC were sufficiently compelling, the CPUC had available other means more precisely tailored to achieving that interest.

#### A. The State Interest Cited by the CPUC Is Not Sufficiently Compelling.

The CPUC identified the state interest supposedly furthered by its decision as "the assurance of the fullest consumer participation in CPUC proceedings and the

[10] Relying on the fundamental right to be free from the compulsion to speak, the New York State Supreme Court recently held that an attempt by the New York Public Service Commission to compel public utilities to open their billing envelopes to inserts prepared by various consumer groups violated the First Amendment and state constitutional rights of the utilities. *See Consolidated Edison Co.* v. *Public Service Commission*, No. 10762-84, slip op. at 5-9 (N.Y. Sup. Ct., Albany County, Apr. 10, 1985). The result reached by the New York court is appropriate in this case as well.



most complete understanding possible of energy-related issues." [11] The conclusion that this state interest justifies the CPUC's infringement of PGandE's free speech rights is at odds with established First Amendment doctrine. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), this Court established that a desire to provide "equal access" for competing views cannot override a party's First Amendment interest in being free from the compulsion to disseminate the messages of others. This principle was explicitly reaffirmed in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which established that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. In light of these decisions, the CPUC's attempt to enhance the speech of TURN by restricting the First Amendment rights of PGandE cannot be upheld.

#### B. Alternatives Less Restrictive of PGandE's First Amendment Rights Were Available to the CPUC.

Even the most compelling state interest cannot justify the infringement of fundamental First Amendment rights unless that interest is achieved by the means least restrictive of the rights violated. As this Court has recognized, even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

The state interest cited by the CPUC—"the assurance of the fullest consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues"—could be achieved readily and effectively by means less restrictive of PGandE's First Amendment rights than the means selected. In-

[11] Dec. No. 83-12-047, *reprinted in* J.S. App. at A-1, A-22.

deed, this interest could be achieved by means that would not restrict PGandE's First Amendment rights at all. For example, both enhanced consumer participation in CPUC proceedings and public understanding of energy-related issues could be promoted by direct dissemination of information to consumers by the CPUC or other state agencies. Thus, even if the state interest cited by the CPUC were "compelling," the means chosen to achieve that interest render the CPUC's action in violation of the First Amendment.

## CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of California should be reversed.

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